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In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1398.

JOHNSON PRODUCTS, INC.,
Appellant,

v.

CITY COUNCIL OF MEDFORD ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM.

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JOHNSON PRODUCTS, INC.,
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CITY COUNCIL OF MEDFORD ET AL.,
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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM.

Now come the appellees and move to dismiss this appeal or to affirm the judgment of the Supreme Judicial Court of Massachusetts on the grounds that the questions presented by the appeal are so insubstantial as to require no further argument, and that the decision of the state court here appealed rests on an adequate, non-federal basis.

Question Claimed Presented by the Appeal.

Is section 13 of chapter 148 of the General Laws of Massachusetts constitutional within the purview of the due-process clause of the Fourteenth Amendment when, as interpreted by the highest court of Massachusetts, it permits

municipal licensing authorities to deny a license to operate a gasoline station on the basis of facts not presented at the hearing on the issuance of the license and without giving reason for their decision (Appellant's Jurisdictional Statement, p. 2)?

Statement.

A. This appeal may lie as of right if the state statute is *per se* unconstitutional or if its logical application in the particular situation resulted in a deprivation of constitutional rights.

28 U.S.C. § 1257(2).
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282.

It will only qualify for attention, if the basis is in the application, if the appellant points out to the state court the said lack of constitutionality, specifically and clearly.

Hanson v. *Denckla*, 357 U.S. 235, 244.

The burden of establishing that the lack of constitutionality was plainly and clearly demonstrated to the court was upon the appellant.

If the appeal fails as of right, its conversion to a petition for certiorari might follow, and the appeals to the exercise of discretion would be considered.

Lawrence v. *State Tax Commission of Mississippi*, 286 U.S. 276.
28 U.S.C. § 1257(3).

The appellees submit that the decision was not made on "facts" not presented, as the question posed assumes.

The appellees submit that the application of the statute was never argued and that there is nothing to evoke the use of discretion in favor of the appellant.

The statement of the petitioner relative to Massachusetts practice on demurrers is correct to a point, but for more substantial accuracy it must be said that not all facts pleaded, but only facts well pleaded, are deemed to be true.

Johnson Products, Inc. v. *Medford,* Jurisd. St., App. A, p. 19.

Lloyd v. *Howes,* 350 Mass. 19, 21.

The distinction is important in this case since the Massachusetts court has stated that the original petition was objectionable on the grounds: "(1) [it] recites extraneous matters to which a response is impossible; (2) [it] states generalities of fact and conclusions of law to support allegations of arbitrariness and unlawful conduct."

Jurisd. St., App. A, pp. 18, 19.

The portions of the appellant's statement, contained in a footnote, that deal with what occurred in the dismissal of its petition for a declaratory judgment (Jurisd. St. p. 3) are superfluous and confusing in that the said dismissal was not appealed to this court.

Chapter 148 of the General Laws of Massachusetts is a comprehensive legislative effort to completely cover the subject of "Fire Prevention" in the Commonwealth. The section involved here, section 13 (Jurisd. St., App. B, p. 23), is only one of fifty-six or fifty-seven sections.

The City of Medford has a zoning ordinance and a building code. The former (c. 29, § 5.3, item 26) requires a special permit for gasoline filling stations to be issued by the Council in the zoning district occupied by the locus in

question, as well as a permit under G.L. c. 148, § 13, to operate the said station. In other zoning districts created by the ordinance no special permit is required.

Argument.

1. The appellant has failed to bring himself within 28 U.S.C. § 1257(2).

By its own admission (Jurisd. St. p. 4, portion of footnote 2) the appellant reveals that the constitutional effect on its petition for certiorari was not argued. The argument was made only in a different case, the petition for a declaratory judgment.

The issue of unconstitutionality had to be made plain and clear.

Hanson v. *Denckla*, 357 U.S. 235.

Lest concern about a miscarriage of justice might arise, it should not be overlooked that the appellant had a full trial on the merits in that same "other" case.

2. The "application" filed by the appellant with the City was ambiguous.

This document (R. 4) could pass for a request for a building permit, a request for a special permit under the zoning law (G.L. c. 40A, § 4, as amended by Acts 1966, c. 199), or a request for a permit under G.L. c. 148, § 13. It was the forerunner of a confused petition for a writ of certiorari. Neither this court nor the court below should be obliged to sort out what the "application" meant.

3. The petition for certiorari did not contain sufficient well-pleaded allegations to merit a return, as pointed out

in the decision of the Supreme Judicial Court and for the reasons stated in its decision.

It has been stated that there is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare. If error of law is claimed, it must be made to appear upon the face of the return, and, if the return is inadequate, the petitioner must take steps to have it extended to show the error which he claims.

Kidder v. *City Council of Brockton*, 329 Mass. 288, 289.

In the petition requesting certiorari, assuming it to be well pleaded, it appears that matters germane to the decision of such an issue were discussed at a public hearing: public health, public safety, public welfare, fire hazards, building hazards, amount of storage and the location of the business. All of these matters were before the City Council and it had a chance to make a decision on them, and did. There was no evidence at all that the petitioner was denied any opportunity to present its problems or views to the City Council. It was represented by counsel. There was no reason, therefore, to assume that any return would show error, and it does not appear logical to require the filing of a return to establish evidence that is not properly alleged to exist. There was therefore nothing well-pleaded as to the "face of the record" to show apparent error.

4. In Massachusetts a successful applicant under G.L. c. 148, § 13, receives "a covenant running with the land" as well as a gasoline permit for the location upon use of the privilege. The practice is uniformly applied throughout the state.

Saxe v. *Street Commissioners of Boston*, 307 Mass. 495.

The local authority is given wide discretion beyond the mere question of fire risk, and may consider matters affecting the public interest.

Scudder v. *Selectmen of Sandwich,* 309 Mass. 373.

Kidder v. *City Council of Brockton,* 329 Mass. 288, 289.

See *Marchesi* v. *Selectmen of Winchester,* 312 Mass. 28, 30, 31.

Such a license is not subject to the "ordinary business rule" relative to issuance.

See 9 McQuillin, Mun. Corp. (3d ed.), § 26.66.

The operation of gasoline filling stations is generally the subject of special regulation at the local level everywhere.

7 McQuillin, Mun. Corp. (3d ed.), § 24.345.

5. Where discretion is invested in local officials, no reasons need be given to explain a decision denying a special zoning permit or a land-use permit.

Such a decision has the aspect of being the exercise of legislative power and also one of the exercise of quasi-judicial power. In any event, no statement of reasons, unless specifically provided for, is required under either concept in the premises. The decisions are obviously not ministerial or merely administrative, since it is contemplated that some applications will be denied as a matter of discretion. The Massachusetts statute recognizes the need for local views on these matters and has delegated the power accordingly to the local authorities to decide.

Conclusion.

This court is being asked to review the action of the Supreme Judicial Court of Massachusetts in its ruling on a demurrer to a petition for a writ of certiorari. If the demurrer should have been overruled, then the issuance of the writ is still discretionary. The petitioner has had his day in court on the merits of his case in any event. The matter has no substance for the consideration of this court.

The matter received careful review at the state level. The appellant, having established no constitutional rights, was deprived of nothing.

For the reasons stated, it is respectfully submitted that this motion should be granted and that the appeal should be dismissed, or, in the alternative, that the judgment of the Supreme Judicial Court should be affirmed.

Respectfully submitted,

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